Supreme Court, U.S.
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No. _____

IN THE SUPREME COURTOF THE UNITED STATES

October Term, 2003

SHERRY BURNS BEAVERS,
Petitioner,

v.

JAY BROWN, Individually, ET Al;
ROBERT ANTHONY CORRAL,
Individually And As Deputy Jailer Of
Parker County, Texas.

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

WHEN AN EIGHT AMENDMENT VIOLATION FOR SEXUAL ABUSE OF AN INMATE BY A GUARD HAS BEEN PROVEN, IS THE AWARDING OF $1.00 DAMAGES AND NO EXEMPLARY DAMAGES CONSTITUTIONAL?

II.

SINCE RESPONDENT CORRAL WAS A DEPUTY SHERIFF OF PARKER COUNTY, TEXAS, DURING THE SEXUAL ABUSE, DOES HIS ACTIONS MAKE PARKER COURNTY, TEXAS LIABLE?

III.

WAS THE DENIAL OF A JURY TRIAL TO PETITIONER IN THIS CASE PROPER?

IV.

WAS THE DENIAL OF ATTORNEY FEES TO PETITIONER'S ATTORNEY IN THIS CASE PROPER?

LIST OF PARTIES

The parties to this appeal and their attorneys are set forth here:

1. Sherry Burns Beavers, Petitioner.

2. Frank P. Hernandez, Petitioner's Counsel of Record.

3. Jay Brown, Individually and as Sheriff of Parker County, Texas, Respondent.

4. Robert Anthony Corral, Individually and as a former Deputy Jailer of Parker County, Texas, Respondent.

5. Parker County, Texas, a "real party in interest," Respondent.

6. Grant D. Blaies, Respondent's Counsel of Record for Jay Brown and Parker County, Texas.

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The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES SUPREME COURT:

Sherry Burns Beavers, hereinafter "Petitioner " or "Beavers" petitions for a *writ of certiorari* to review, reverse and/or remand the judgment of the Fifth Circuit Court of Appeals wherein the Circuit Court affirmed the awarding of $1.00 damages for sexual abuse of a female inmate by a male jailer, denied exemplary damages, denied attorney fees, and refused to grant a trial by jury.

OPINIONS BELOW

On January 6, 2003 the District Court granted Respondents Jay Brown and Parker County, Texas' Motion To Dismiss, [Appendix I], and entered its Final Judgment As To Defendant. [Appendix H]. On January 16, 2003 the District Court dismissed Petitioner's claims against Respondent Robert Anthony Corral, holding that "no lesser sanction would adequately address" Petitioner's failure to appear for a hearing. [Appendix G]. On the same day the District Court entered a Final Judgment. [Appendix F]. Petitioner filed a Motion For New Trial demonstrating that it was a clerical and postal error that resulted in Petitioner not being given notice of the hearing, and on January 28, 2003 the District Court granted Petitioner's Motion For New Trial and set aside it's Order And Final Judgment entered on January 16, 2003. [Appendix E]. On February 28, 2003 the District Court entered a Memorandum Opinion And Order awarding Petitioner a $1.00 default judgment, plus costs, exclusive of attorney fees. [Appendix D]. On the same day the District Court entered a Final Judgment. [Appendix C]. On January 28, 2004 the Fifth Circuit Court issued a "do not publish" opinion affirming the District Court's Judgment. [Appendix B]. Petitioner filed a Motion For Rehearing En Banc, and on February 26, 2004 the Fifth Circuit Court "Treating the Petition For Rehearing En Banc as a Petition for Panel Rehearing," denied the

petition, and denied the Petition for Rehearing En Banc. [Appendix A].

JURISDICTION

The jurisdiction of the Court is invoked under its review authority under 28 U.S.C. § 1254(1) and §2101(c). The date of the judgment sought to be reviewed is February 26, 2004. Jurisdiction in the Northern District Court was based on 42 U.S.C. § 1983 and the Eight Amendment to the United States Constitution. Appellate jurisdiction to the Fifth Circuit Court of Appeals was based on 28 U.S.C. § 1291.

APPLICABLE CONSTITUTIONAL PROVISIONS

The Eight Amendment, U.S. Constitution.

STATEMENT OF THE CASE

This is a case of first impression in this Court.

This is a case that arises under 42 U.S.C. § 1983, the Eight Amendment of the United States Constitution, and the laws of the State of Texas. This is a default judgment case. This is a case where a jury was properly demanded and denied. This is a case where nominal damages of $1.00, plus interest was awarded Petitioner, a sexual abuse victim of her supervising jailer, and where attorney fees were denied although liability was established and proven.

Beavers was an inmate from November 17, 1999 in the Parker County jail and remained so at all times relevant to the unlawful actions of Respondent Corral. ['Corral"] On the initial occasion that Beavers met Corral, Beavers was in her cell crying. Corral comforted Beavers and requested that Beavers write him. She did so and Corral started correspondence with Beavers. Corral knew that such correspondence was against the law and violated the Rules And Regulations of the Sheriff Department of Parker County, Texas. Corral established a procedure to start a relationship with Beavers that Corral knew would result in official oppression of Beavers for unlawful sex with a person incarcerated, a violation of federal and Texas law. Corral's acts and correspondence to Beavers started with his touching Beavers' fingers and concluded with sexual intercourse with Beavers in the library of the Parker County jail. On December 4, 2000 Corral was charged by Information And Complaint with intentionally engaging in sexual intercourse with Beavers. Corral knowingly and intentionally, through implied threats and intimidations, forced Beavers to perform sex acts with Corral for Corral's own self gratification causing abuse, mental anguish, physical injury, humiliation, embarrassment and damages to Beavers. On July 9, 2000 Corral resigned his position as Deputy Sheriff and on February 21, 2001 Corral pled guilty to two cases of committing an improper sexual act with a person in custody and he received a sentence of confinement in a Texas State Jail for a term of two years probated, with community supervision for a

period of five years, and a $1,000.00 fine. Corral violated his probation and was incarcerated in a Texas State Jail at the time Beavers sued him.

COURSE OF PROCEEDINGS BELOW

Beavers filed her Plaintiff's Original Complaint And Jury Demand on April 5, 2002. Corral's Waiver Of Service Of Summons properly signed by Corral on May 22, 2002 was filed on June 3, 2002. Brown and Parker County filed their Answer on June 7, 2002. The Joint Status Report was filed on June 28, 2002. Beavers filed her Demand For Default Judgment against Corral on June 28, 2002. The Court, on July 1, 2002 entered an Order requiring Beavers to request that the District Clerk enter a default judgment against Corral, denied Beavers a jury trial on the damage issue, the exemplary damage issue and the attorney fee issue, and set a hearing to determine the amount of damages. Beavers filed her Request That The Clerk Of The Court Enter A Default Judgment against Corral on July 16, 2002. The District Clerk entered a Default Judgment against Corral on July 16, 2002. Brown and Parker County filed their Motion To Dismiss And Brief In Support Thereof on December 4, 2002. Beavers responded to Brown and Parker County's Motion To Dismiss on December 30, 2002. Brown and Parker County filed their reply to Beavers response on January 6, 2003. On January 6, 2003 the Court entered a Memorandum Opinion and Order granting Brown

and Parker County's Motion To Dismiss. The Court entered a Final Judgment As To Defendant decreeing that Beavers recover nothing from Brown and Parker County. On January 7, 2003 the Court entered an Order setting the hearing on "plaintiff's motion for default judgment" on January 16, 2003 at 10:00 a.m. Beavers did not receive this Order because of postal service problems until January 16, 2003 at approximately 10:25 a.m. This information was communicated to the Court through his law clerk immediately, but the Court nevertheless entered an Order dismissing Beavers claims against Corral for want of prosecution on January 16, 2003. The Court entered a Final Judgment regarding Corral on the same day, January 16, 2003.

Beavers filed her Motion For New Trial on January 27, 2003. Without a hearing the Court granted the Motion For New Trial on January 28, 2003. Beavers filed her Notice of Appeal regarding Brown and Parker County on February 5, 2003. On February 13, 2003 a hearing was held on Beaver's Default Judgment against Corral. The Court denied Beaver's request for a jury trial, and the use of extended videos , took testimony from the witnesses, admitted Exhibits 1 through 6, made findings on the record, and requested a memorandum of law by 2:00 p.m. on February 18, 2003. Prior to the hearing Beavers filed her Witness List, Exhibit List, and her Proposed Finding of Fact And Conclusions of Law. In accordance with the Court's Order, Beavers filed her memorandum styled Plaintiff's Response To

Court Order Of February 13, 2003 on February 18, 2003.

On February 28, 2003 the Court entered its Memorandum Opinion And Order awarding Beavers a default judgment as to liability against Corral and awarded $1.00 as nominal damages for Beavers, and since the Court did not consider Beavers a prevailing party, denied attorney fees. The Court concluded that, "there is no viable §1983 claim in this case." A Final Judgment was entered on February 28, 2003. Beavers filed her Notice of Appeal from the February 28, 2003 Judgment on March 19, 2003. Beavers filed a motion with the Firth Circuit to consolidate the appeals and on April 23, 2003 it was granted. The Fifth Circuit affirmed on January 28, 2004 and denied Petitioner's Motion For Rehearing En Banc on February 26, 2004.

STATEMENT OF THE FACTS

This is a case brought under 42 U.S.C. §1983, the Eight Amendment of the United States Constitution and the laws of the State of Texas.

This is an abuse of discretion case as it relates to the Trial Court not allowing Beavers to try her claims to a jury.

This is a case where the Trial Court improperly found that Beavers consented to the sexual action when, in fact, because Beavers was an

inmate in the Parker County Jail, and Corral was a Deputy Sheriff who had supervisory authority over Beavers, Beavers could not give consent to participate in the sex act.

Beavers testified that she met Corral in the Parker County Jail while she was incarcerated, that Corral was a Deputy Sheriff of Parker County, that Corral supervised Beavers, that he was in his Parker County Sheriff uniform, with his firearm, when he made sexual advancements towards her. Beavers explained how Corral approached her as she was detained in a single cell somewhat depressed about the loss of her grandfather. Corral asked her and her sister to go to the library with him and they did. Beavers assumed that they we going to the library so that they could talk, but once they got to the library Corral made very strong sexual advances towards Beavers. Beavers and Corral eventually had sexual intercourse three times, starting in May of the year 2000. Beaver's participation in the sex act was not consensual as she "very much" feared Corral as a deputy jailer because, "That if I didn't do what he asked me to do that I would be in harms way even more, or treated worse that I was already being treated."

As a result of the sexual intercourse Beavers contacted two diseases, a pelvic inflammatory disease and trichomonas. The pelvic inflammatory disease infected all of Beaver's organs and she thought she was going to die. Beavers had swelled

up and was in a lot of pain, and after being taken to the hospital, the existence of the diseases were confirmed. Because of her depression Beavers gained a lot of weight, partly because of the medications she was taking. In addition to the physical diseases and pain Beavers suffered, she also suffered mental anguish because of the lies told to her by Corral and she then suffered from a depression. Beavers cried daily because of her situation, and still cries sometimes. Beavers was depressed for a good six months. Her situation improved once she was transferred to the Tarrant County Jail, and the Texas State Jail in Gatesville, Texas. Beaver's entire medical record while she was incarcerated in the Parker County Jail was admitted as Exhibit No. 4. These records confirmed that she received medical treatment and prescription drugs for her depression. After it became known that Corral had had sex with Beavers, she was treated very poorly in the Parker County Jail. Beavers was given small portions of food to eat, dirty clothes to wear, and was transferred to a single cell where she was denied exercise time and her one hour per day outside of the single cell time. Because of what had occurred with Corral, Beavers felt humiliated and embarrassed. Beavers received, as part of her medical treatment, counseling from counselors and social workers, and treatment from psychiatrists, that helped her, somewhat.

Beavers testified as to her damages that she was requesting that the Court award her One Million

Dollars in damages, and in response to questions by the Court, justified her damages based on awards in similar cases in Tarrant County, Texas.

Ms. Linda Rushing, Beaver's mother, confirmed that Beavers got very sick, that she cried a great deal, that she was depressed, and that she had gotten a sexually transmitted disease. In Rushing's opinion Beavers has improved since her release from prison, but the events are still troublesome to Beavers, even though Beavers tries to hide her mental state, but its still in the back of Beaver's mind.

Mr. Phillip Jones, a licensed attorney who has been practicing law for 24 years, testified that he represented Beavers in her criminal cases, and when Jones first met Beavers she seemed of good spirits, and was a bright and happy person generally. "She was making the best of what she had at the time." Jones first learned of the sexual action between his client and Corral in May of 2000 after Beavers called him wanting to talk with him because "she was afraid and seemed to be very, very depressed." Jones described Beavers as being "very frightened" and afraid and not looking healthy because she had started gaining weight, which was contrary to Beavers' usual self. Jones observed Beavers in her depressed mental state and in her frightened state of mind, which did not improve as long as Beavers was incarcerated in the Parker County Jail. The criminal charges against Beavers by the State of Texas in Parker County were dismissed so Beavers "spent all

that time in Parker County for nothing." After Beavers was transferred to the Tarrant County Jail she was relieved, but still nervous, and while in Gatesville she was a model prisoner who had not forgotten the past, but the past wasn't weighing as heavy on her as before.

REASONS FOR GRANTING THE WRIT

This is a case of first impression in this Court. Although violations of an inmates rights under the Eighth Amendment have been considered by this Court, the amount of civil damages for liability has not been addressed by this Court. The various lower court opinions clearly demonstrate that there is no uniformity in the recognition of a female inmates legal damages for sexual abuse by a "keeper of the keys" to the jail. Furthermore, the denial of a trial by jury, exemplary damages and attorney fees has a "chilling effect" on this type of litigation that must not be accepted under the Eight Amendment if inmates rights are to be protected.

SPECIFIC LEGAL REASONS FOR GRANTING THE WRIT

1. There are very few cases regarding the Eighth Amendment rights of female inmates when they have sex with male guards and this Court should provide the necessary guidance for the legal community in determining the proper amount of damages when liability is proven.

There are no Fifth Circuit Court of Appeals cases in this area. There are few cases in the other circuits on point. There are several cases from this Court in this area, namely: *Farmer v. Brennan*, 511 U.S. 825 (1994) and *Helling v. McKinney*, 509 U.S. 25 (1993), which cites *Estelle v. Gamble*, 429 U.S. 97 (1976). These cases address the issue of prison officials violating an inmate's right under the Eighth Amendment. They do not address the issue of the amount of damages and what are proper damages.

The district court cases cover the wide range of opinions from an inmate not being able, as a matter of law, to consent to sexual activity because of her incarceration, *Carrigan v. Davis*, 70 F. Supp. 2d 448 (D. Del. 1999),(holding "as a matter of law, that an act of vaginal intercourse and/or fellatio between a prison inmate and a prison guard, whether consensual or not, is a per se violation of the Eighth Amendment") to *Phillips v. Bird*, No. 03-247-KAJ (D. Del. 12/01/2003) 2003.DDE.0000372<http://www.versuslaw.com>(Holding that where a female inmate agreed to have consensual sex she had no claim under the Eighth Amendment.

2. Corral's Guilty Plea Confirmed The Violation Of Beaver's Eighth Amendment Rights

When Corral pled guilty to the felony charge of having sex with a person in custody, he acknowledged that he knowingly and intentionally violated a Texas felony statute and Beavers' Eighth Amendment rights and her rights under 42 U.S.C. § 1983. It is clear that if Beavers had consented Corral

would not have been prosecuted for his actions. The felony statute and Eight Amendment violations violated the established public policy of the United States and the State of Texas. This is so because a Deputy Sheriff is the "keeper of the keys" to the jail and in such a position he has a distinct advantage in his sexual dealings with female inmates such as Beavers. A sexual assault on an inmate by a guard is deeply "offensive to human dignity." *Felix v. McCarthy*, 939 F.2d 699, 702 (9th Cir. 1991). Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'" *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). It may be argued here that Beavers was not violently assaulted, but since penetration occurred, and she as an inmate could not give consent, it was an assault against her will and not consensual. It matters little whether the assault is forceful and violent, or suave and gentle, the result is the same, the guard receives the sexual gratification he desired. In the most simplest and absolute terms, the Eighth Amendment right of Beavers to be free from sexual abuse was unquestionably clearly established prior to the time of the sexual intercourse, and no reasonable prison guard could possibly have believed otherwise. *Schwenk v. Hartford*, 204 F.3d 1187, (9th Cir. 2000). In *Devereaux v. Perez*, 218 F.3d 1045, (9th Cir. 2000) the Court referenced Schwenk when it stated: "In *Schwenk v. Hartford*, we held that a prison guard was not entitled to qualified immunity against a complaint alleging that he tried to compel a prisoner

to engage in sex with him, because any reasonable prison guard would realize that sexual abuse of prisoners violated the Eight Amendment, and 'no case is necessary to establish the truth of the underlying proposition.'" *United States v. Lanier*, 520 U.S. 259, 270 (1997). There is no distinction between a prison guard who uses some sort of force, and one who uses emotional and suave persuasion, with an implied threat of force or other actions, as in this case. The evidence is clear that Corral initiated the contact when Beavers was grieving from the loss of her grandfather. It is clear that Beavers was a victim in this case. At the moment that Corral commenced his "wooing" of Beavers he commenced to violate her Eight Amendment rights. The fact that Corral pleaded guilty thereby admitting that he knowingly and intentionally violated Beavers' Eight Amendment rights made him liable for his criminal actions in this civil action. There is no question that the actions of Corral were sexually motivated and were sexual harassment. *Green v. Administration of Tulane Educational Fund*, 284 F.3d 642, (5th Cir. 2002). There is no question that Corral was acting under the color of law requirement of 42 U.S.C. § 1983. *Bonenberger v. Plymouth Township*, 132 F.3d 20, 23-25 (3rd Cir. 1997).

3. Beaver's Substantive Due Process Right To Bodily Integrity

It is undisputable that Beavers has a substantive due process right to bodily integrity.

Planned Parenthood v. Casey, 505 U.S. 833 (1992); *McClendon v. City of Columbia*, 305 F.3d. 314, (*en banc*) (5th Cir. 2002). The Fifth Circuit Court has held that in a situation involving sexual abuse of a public school child by her teacher, that "[t]he right to be free of state occasioned damage to a person's bodily integrity is protected by the fourteenth amendment guarantee of due process." *Doe v. Taylor Independent School District*, 15 F.3d 443, 450-451 (5th Cir. 1994) (*en banc*) (quoting *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981); *Rogers v. City of Little Rock*, 152 F.2d 790, 796 (8th Cir. 1998), *Plumeau v. School District #40 County of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997). In addition to just having intercourse with Beavers, Corral knew he had a communicable venereal decease, and he injected it into Beavers intentionally, thereby further violating her bodily integrity.

4. Beavers Is Not Capable Of Giving Legal Consent To Sexual Acts While An Inmate In The Parker County Jail

Beavers, while an inmate of the jail is not capable of giving consent to the sexual acts, even though she may have participated in the sexual intercourse. Beavers testified that she feared Corral and was afraid not to do what he asked her to do for fear that things would get worse for her while he supervised her. The Eighth and Fourteenth Amendments prevent her from being able to give

legal consent, respective of the fact that she believed Corral's lies. While in jail she is a ward of Parker County. Corral is in a position of trust as a Deputy Sheriff and her supervisor and she must obey his directions. Once Corral initiates contact for sexual purposes he violates the Eighth and Fourteenth Amendments, as well as the laws of Texas. The Texas criminal laws that govern a guards sexual actions reflect the public policy of the State of Texas that guards are not to have sexual contact with an inmate because of their position as an employee of Parker County. The most similar legal position is the public policy established by Texas is the laws relating to a man having sex with a minor female. Even though the young woman may appear to consent to the sex act she cannot give legal consent because of her age. No matter how much she may enjoy the sex act or how much she "consents" to performing the sex act, she cannot legally consent. The same rule applies to the relationship between a Sheriff Deputy and an inmate because the deputy is in an advantageous trust position with power over the inmate and he has the capability of violating that trust for his own sexual gratification. When this occurs the Deputy Sheriff should know that he will have civil liability. *Schwenk* at 1198. Also, when this occurs, Parker County becomes liable because it has placed Corral in a position where he wields sufficient authority to satisfy the color of law requirement of 42 U.S. C. § 1983. *Bonenberger v. Plymouth Township*, 132 F.3d 20, 23-25 (3rd. Cir. 1997). Parker County can be held liable under 42

U.S. C. § 1983. *Board Of County Commissioners v. Brown*, 520 U.S. 397, 404, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997). Parker County is liable because a judgment against a Deputy Sheriff, a guard, in his official capacity, imposes liability against the entity that he represents. *Brandon v. Holt*, 469 U.S. 464, 105 S. Ct. 873, L. Ed. 2d 878 (1985); *Cagle v. Gilley*, 957 F.2d 1347, 1350 (6th Cir. 1992). And, Brown and Corral can be held liable in their individual capacities for damages under 42 U.S. C. § 1983. *Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358, 362, 116 L. Ed. 2d 301 (1991).

5. BEAVERS IS ENTITLED TO MORE THAN $1.00 NOMINAL DAMAGES AND IS ENTITLED TO EXEMPLARY DAMAGES.

Beavers testified that she thought proper damages would be One Million Dollars. The Trial Court questioned her about how she arrived at the damages figure, but never asked her to give any indication as to any amount Beavers thought would be appropriate for any particular element of damages. Upon questioning by the Court she explained that she reached that conclusion by being familiar with the $2.8 Million award to four women under similar circumstances in Tarrant County, Texas. [The Court admitted Plaintiff's Exhibits 5 and 6, for all purposes, which contained the damage amounts awarded in similar cases in the Northern District of Texas]. As testified to by Beaver's

counsel the two exhibits demonstrated that in similar cases the women received damages of $400,000.00 and exemplary damages of $500,000.00 in the Tarrant County case, and several young girls who were sexually abused settled for $1,500,000.00. *Toon v. Wackenhut Corrections Corporation*, 250 F.3d 950 (5th Cir. 2001). The damages awarded in these two cases provided the Trial Court with a standard of damages to award when guards have intercourse with inmates. Since the Court accepted this uncontroverted evidence it was the only evidence on the issue of damages and exemplary damages. Consequently, the award of $1.00 plus interest was woefully inadequate, unconstitutional, and should be reversed. There is no question that the District Court found that Corral was liable and that Beavers was entitled to damages. It appears that the Court awarded the inadequate damages because of Beaver's past criminal record and prior venereal decease. These questions were not proper and should not have been considered in awarding damages. The Court, although there had been no direct evidence of Beaver's prior criminal record either in the pleadings or in her testimony, inquired about criminal charges relating to Beavers that had no relevance to the unlawful acts performed by Corral. The Court's reasoning that Beavers expected a long term relationship and therefore was not a credible witness is not plausible since she testified she was in fear of Corral and what he could do to her if she did not properly respond to his requests for sex. Likewise, the Court's reasoning

that Beaver's pleadings were not true is not true as the evidence clearly proved her allegations. Since all of the evidence on damages is before this Court it can reverse the damage award and enter a proper actual damage, exemplary damage and attorney fee award. *Mathie v. Fries*, 121 F. 3d 808 (2nd Cir. 1997)(Holding that $250,000.00 in compensatory damages was correct and awarding, by remand, punitive damages of $200,000.00 for entry of judgment.)

6. BEAVERS IS ENTITLED TO ATTORNEY FEES SINCE BEAVERS PROVED LIABILITY.

If the plaintiff is the prevailing party in a 42 U.S.C. § 1983 action, or one under the Eighth Amendment, she is entitled to recover attorney's fees and costs pursuant to 42 U.S.C. § 1988. The Court awarded costs against Corral, but excluded attorney fees. Beavers is a prevailing party because she obtained a "judicially sanctioned change in the legal relationship of the parties". *Bennett v. Yoshina*, 259 F.3d 1097, 1101 (9th Cir. 2001). The principles underlying attorneys' fees awards pursuant to § 1988 are the same as those governing cases brought pursuant to Title VII and all other federal civil rights cases. *Hughes v. Roe*, 449 U.S. 5, 14, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980). The evidence on attorney fees demonstrated that the fee had been calculated using an established approved method. It is clear that Beavers was entitled to an award of attorney

fees. It is also clear that the Court knew that a district court is required to award full attorneys' fees when the plaintiff is awarded any sum that exceeds mere nominal damages. *Nephew v. City of Aurora*, 830 F.2d 1547 (10th Cir. 1987)(*en banc*). By awarding only nominal damages to Beavers, he excluded hard earned attorney fees. The evidence on Attorney fees is uncontroverted and was not questioned by the District Court. Perhaps the District Court acted in this way because he already had determined that he was going to award Beavers nominal damages, which would negate some of the fees. In not awarding attorney fees, the Court committed error. *Hewitt v. Helms*, 482 U. S. 1, 107 S. Ct. 2672. 2676, 96 L. Ed. 2d 654 (1987). At the very least the Court should have awarded some attorney fees. This Court, since the attorney fees evidence is uncontroverted, can set the attorney fee figure and award a judgment.

7. BEAVERS IS ENTITLED TO A JURY TRIAL ON THE DAMAGE, AND EXEMPLARY DAMAGE CLAIMS.

In her complaint Beavers did demand a jury trial. In her Motion For New Trial, Beavers requested a trial by jury. Prior to the hearing on damages, Beavers requested a jury trial, which is governed by Fed. R. Civ. P. 39(b). Immediately before the taking of testimony during the hearing on damages Beavers orally requested a jury trial. Clearly, if Corral had not defaulted, Beavers would

have been entitled to a jury trial. The hearing on damages held by the District Court is the same as any other trial except that it is limited to the question of damages. *Peitzman v. City of Illmo*, 141 F.2d 956, 962 (8th Cir. 1944), *cert denied* 65 S. Ct. 47, 323 U.S. 718, 89 L. Ed. 577 (per Gardner, J.); Wright & Miller, *Federal Practice And Procedure*, §2688. "Thus, although defendant has no right to a jury trial on the question whether plaintiff should recover, a jury trial may be appropriate with regard to the amount of recovery." Wright & Miller, F*ederal Practice And Procedure*, §2688. *Cf.*: *Kormes v. Weis, Voisin & Co.*, 61 F.R.D. 608 (D.C. Pa. 1974) (Defendant would be granted a jury trial on the issue of damages after a default judgment when plaintiff had endorsed the jury demand on his complaint and defendant never consented to its withdrawal.)

"This Court has maintained the view that a trial court, in exercising its Rule 39 discretion, 'should grant a jury trial in the absence of strong and compelling reasons to the contrary.' S*wofford v. B & W, Inc.*, 336 F.2d 406, 409 (5th Cir. 1964), *cert. denied*, 379 U.S. 962, 85 S. Ct. 653, 13 L. Ed. 2d 557, 144 U.S.P. Q. (BNA) 780. See also *Pinemont Bank v. Belk*, 722 F. 2d 232, 236 (5th Cir. 1984). Indeed, the Fifth Circuit Court has stated, 'A motion for trial by jury submitted under Rule 39(b) should be favorably received unless there are persuasive reasons to deny it.' *United States v. Unum, Inc.*, 658 F. 2d 300, 303 (5th Cir. 1981)," *Lewis v. Morris*,

767 F.2d 252 (5th Cir. 1985). The Fifth Circuit Court has also stated that "It should also be remembered that this Court's holding in *Swofford* – that the Rule 39(b)—is based on the long accepted observation that the right to trial by jury 'is a basic and fundamental feature of our system.' *Swofford*, 336 F.2d at 409." *Lewis v. Morris*, 767 F. 2d 252 (5th Cir. 1985). Under Fed. R. Civ. P. 55(2) the "court may conduct such hearings or order such references as it deems necessary and proper and **shall accord a right of trial by jury** to the parties when and as required by any statute of the United States." [Emphasis Added]. The only relevant statue is Section 1874 of Title 28, which is not applicable here. Wright & Miller, *Federal Practice And Procedure*, § 2688. Even in the absence of a statute, however, the court may order a jury trial as to damages in a default situation if it seems to be the best means of assessing damages. (Holding that when a plaintiff has *Barber v. Turberville*, 218 F. 2d 34, 37, 94 U.S. App. D. C. 385 (1954)demanded a jury trial, and subsequently has a default entered, "it is the better practice, if not actually compelled, that the issue as to damages be submitted to the jury."); *Thorpe v. National City Bank of Tampa*, 274 F. 200 (5th Cir.1921)(Holding that on default the question of the reasonableness of an attorney's fee provided for by a note should be submitted to a jury.); *Curtis v. Loether*, 415 U.S. 189, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974)(Holding that the Seventh Amendment guarantees a jury trial where a plaintiff is seeking legal relief, either compensatory or punitive

damages, even though the right to such relief is created by a federal statute.)

CONCLUSION

For these reasons, Petitioner would respectfully request this Court to reverse and vacate the Fifth Circuit's decision affirming the District Court's Judgment that Petitioner is only entitled to $1.00 damages and costs, excluding attorney fees.

Respectfully submitted,

Frank P. Hernandez
716 Wayne Avenue
Dallas, Texas 75223
(214) 821-1213
(214) 821-1214 (FAX)
Attorney For Petitioner

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition for Writ of Certiorari has been served on Pro Se Respondent Robert Anthony Corral, TDC# 1105887, Lidsley State Jail, 1137 Old Post Oak Road, Jacksboro, Texas 76458, and to Attorney of Record, Mr. Grant D. Blaies, Esq., 777 Main Street, Suite 1900, Fort Worth, Texas 76102, on May 26, 2004, via first class mail.

Frank P. Hernandez

Frank P. Hernandez

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 03-10150

SHERRY BURNS BEAVERS
Plaintiff-Appellant

v.

JAY BROWN, Individually; ET AL
Defendants
JAY BROWN, Individually; JAY BROWN, as Sheriff of Parker County Texas; ROBERT ANTHONY CORRAL, Deputy Jailer of the Sheriff Department of Parker County Texas; PARKER COUNTY TEXAS
Defendants – Appellees

Case No. 03-10319

SHERRY BURNS BEAVERS
Plaintiff – Appellant

v.

JAY BROWN, Individually; ET AL
Defendants

ROBERT ANTHONY CORRAL, Individually; ROBERT ANTHONY CORRAL, Deputy Jailer

of the Sheriff Department of Parker County Texas

Defendants – Appellees

Appeals from the United States District Court for the Northern District of Texas, Fort Worth

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ON PETITION FOR REHEARING EN BANC

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in reguilar active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

__/s/_____

United States Circuit Judge

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 03-10150
C/W No. 03-10319
Summary Calendar

SHERRY BURNS BEAVERS
Plaintiff-Appellant

v.

JAY BROWN, Individually; ET AL
Defendants
JAY BROWN, Individually; JAY BROWN, as Sheriff of Parker County Texas; ROBERT ANTHONY CORRAL, Deputy Jailer of the Sheriff Department of Parker County Texas; PARKER COUNTY TEXAS
Defendants – Appellees

Case No. 03-10319

SHERRY BURNS BEAVERS
Plaintiff – Appellant

v.

JAY BROWN, Individually; ET AL
Defendants

ROBERT ANTHONY CORRAL, Individually; ROBERT ANTHONY CORRAL, Deputy Jailer of the Sheriff Department of Parker County Texas

Defendants – Appellees

Appeals from the United States District Court for the Northern District of Texas
(4:02-CV-336-A)

Before BARKSDALE, EMILIO M. GARZA, and DENNIS, Circuit Judges.

PER CURIAM:

In this 42 U.S.C. §1983 action claiming constitutional and state law violations, Sherry Burns Beavers appeals from both a judgment (FED. R. CIV. P. 12(b)(6)) dismissing her consitutional claims against Sheriff Brown and Parker County and an earlier default judgment against Deputy Corral, awarding only nominal damages. (Notwithstanding Beavers' premature notice of appeal, we have jurisdiction over the judgment rendered in favor of Sheriff Brown and Parker County. See *Young v. Equifax Credit Info. Servs. Inc.*, 294 F. 3d 631, 634 n.2 (5th Cir. 2002).)

For the default judgment against Deputy Corral, a hearing was held concerning damages. The district court did not clearly err in finding that the sexual relationship between Beavers, an inmate, and Deputy Corral was consensual. *Cf. Theriot v. Parish of Jefferson*, 185 F.3d 477, 490 (5th Cir. 1999), cert. denied, 529 U.S. 1129 (2000). We need not reach the legal issue whether this consensual

relationship violated the Constitution, because Deputy Corral's liability is not in dispute.

Beavers has pointed to no evidence overlooked by the district court in determining she had not suffered a compensable injury; therefore, she has not shown that the nominal damages award was clearly erroneous. *See Texas A&M Research Found. V. Magna Transp., Inc.*, 338 F.3d 394, 404 (5th Cir. 2003); *Williams v. Kaufman County*, ___F.3d ___, No. 02-10500, 2003 WL 22890399, *15 (5th Cir. 9 Dec. 2003).

Beavers has also failed to demonstrate that the district court's refusal to award exemplary damages against Deputy Corral was an abuse of discretion. See *Sockwell v. Phelps*, 20 F.3d 187, 192 (5th Cir. 1994). Additionally, Beavers was not constitutionally entitled to a jury trial on the damages issue; nor has she demonstrated that the district court abused its discretion in denying her request. See FED. R. CIV. P. 55(b)(2); *In re Dierschke*, 975 F.2d 181, 185 (5th Cir. 1992).

The district court acted within its discretion in denying Beavers' request for attorney's fees, given: she produced no evidence that any damage arose from the claimed constitutional deprivation; and, moreover, her victory produced no "public benefit" to justify an award of fees in spite of receiving only nominal damages. See *Hidden Oaks Ltd. V. City of Austin*, 138 F.3d 1036, 1053-53 (5th Cir. 1998); 42 U.S.C. § 1988. The district court also did not abuse its discretion by not ordering Beavers to submit a FED. R. CIV. P. 7 reply to defendants' qualified immunity defense because the court dismissed Sheriff Brown and the County on grounds other than

qualified immunity. See Schultea v. Wood, 47 F.3d 1427, 1433 (5th Cir. 1995)(en banc).

Beavers' contention that the district court erroneously dismissed her claims against Sheriff Brown in his individual capacity is inadequately briefed and is therefore waived. E.g., *Yobey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993). We also reject her contention that the district court's FED. R. CIV. P. 12(b)(6) dismissal was inappropriate. See *Shipp v. McMahon*, 234 F.3d 907, 911 (5th Cir. 2000) (de novo review), overruled on other grounds by, *McClendon v. City of Columbia*, 305 F.3d 314, 328 95th Cir. 2002)k, cert denied, 537 U.S. 1232 (2003). Beavers' complaint failed to identify either an unconstitutional official policy or a custom instituted by Parker County and/or Sheriff Brown that caused the claimed constitutional deprivation. See *Colle v. Brazos County, Tex.* , 981 F.2d 237, 244 (5th Cir. 1993). Moreover, her allegations of a causal connection between Sheriff Brown's conduct and the claimed constitutional deprivation were purely conclusional and were therefore insufficient to state a § 1983 claim for municipal liability. See *Spiller v. City of Texas City, Police Dep't*, 130 F.3d 162, 167 (5th Cir. 1997).

Finally, Beavers' complaint failed to claim that Parker County's immunity had been waived through liability under the Texas Tort Claims Act. See *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 341 (Tex. 1998). She has shown no error on the part of the district court in dismissing her state law claims on that basis. AFFIRMED

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

SHERRY BURNS BEAVERS, Plaintiff,	* NO. 4:02-
	* CV-0336-A
VS.	*
JAY BROWN, ET AL., Defendants.	*

FINAL JUDGMENT

Consistent with the memorandum opinion and order signed in the above-captioned action on the date of the signing of this final judgment,

The court ORDERS, ADJUDGES, and DECREES that plaintiff, Sherry Burns Beavers, have and recover default judgment against defendant Richard Anthony Corral in the amount of $1.00, plus post-judgment interest thereon from this date at the tare of 1.30% per annum.

The court further ORDERS, ADJUDGES, and DECREES that plaintiff have and recover from defendant Richard Anthony Corral costs of court, exclusive of an attorney's fees, incurred by her.

The court further ORDERS, ADJUDGES, and DECREES that all other relief sought by plaintiff in this action be, and is hereby denied.

SIGNED February 28, 2003.

_/s/_____
JOHN McBRIDE
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

SHERRY BURNS BEAVERS, Plaintiff,	*	NO. 4:02-CV-
	*	0336-A
VS.	*	
JAY BROWN, ET AL., Defendants.	*	

MEMORANDUM OPINION AND ORDER

Before the court for determination is the demand of plaintiff, Sherry Burns Beavers, for default judgment against defendant Richard Anthony Corral ("Corral"). A hearing was held on plaintiff's demand on February 13, 2003. The court has concluded that a default judgment should be entered consistent with this order.

I.
Background

Plaintiff instituted this action by a complaint filed in April 2002. She named as defendants Jay Brown, the Sheriff of Parker County, Texas, who she sued individually and in his capacity as sheriff, and Corral, who she sued individually and in his capacity as a Deputy Sheriff jailer of Parker County, Texas. Plaintiff alleged that her action "arises under

42 U.S.C. § 1983, and the Eight [sic] Amendment of the United States Constitution, and the laws of the State of Texas." Compl. At 1. At the heart of plaintiff's complaint is her contention that Corral forced her to be sexually intimate with him. She alleged:

> 13. Plaintiff would show that Defendant Corral knowingly and intentionally through implied theats and intimidations forced Plaintiff to perform sex acts with Defendant Corral for Defedant Corral's own self gratification causing embarrassment, abuse and humiliation to the Plaintiff.
>
> 14. Plaintiff would show that Defendant Corral's actions amounted to assault and battery and intentional infliction of emotional distress to the Plaintiff.

Id. at 8-9. By her prayer, plaintiff seeks recovery from defendants, jointly and severally, for plaintiff's damages of an amount in excess of three million dollars, plus exemplary damages, attorneys' fees, costs of court, and necessary expenses incurred in presenting the case. Id. at 12.

On January 6, 2003, the court granted a motion to dismiss filed by defendant Jay Brown and Parker County, Texas. Parker County, Texas, was viewed to be a party to this action by virtue of the naming of the individual defendants in their official capacities as officers of Parker County, Texas. See Brooks v. George County, Miss., 84 F.3d 157, 165

(5th Cir.), cert. denied 519 U.S. 948 (1996). A final judgment as to the claims against Jay Brown and Parker County, Texas, was signed on January 6, 2003.

Though Corral signed a waiver of service of summons on May 22, 2002, which was filed in this action on June 3, 2002, he has not answered or otherwise responded. In July 2002, the clerk entered default against Corral. Plaintiff's demand for default judgment against Corral was filed June 28, 2002. The court deferred ruling on the demand until after the claims against Jay Brown and Parker County, Texas, were resolved.

II.
Findings

The following findings supplement those the court expressed on the record during the February 13, 2002, hering held on the demand for default judgment:

Plaintiff was an inmate in the Parker County jail during all or a part of the year 2000. Corral was a deputy sheriff of Parker County, Texas, who served as a jailer throughout a significant part of that period of time. He became acquainted with plaintiff during the performance of his duties as a jailer.

Corral became enamored of plaintiff. He and plaintiff had exchanges of notes, apparently of a romantic nature, that led to a meeting in the law library between plaintiff and Corral, at a time when plaintiff's sister was present. Thereafter, plaintiff and Corral had sexual intercourse on three occasions. While plaintiff said the intercourse was

not consensual, [1] the courtfinds from the evidence received at the hearing that it was consensual. Plaintiff voluntarily and willingly engaged in the intercourse because of a belief and desire on her part that there would be a long-term romantic relationship between her and Corral. The relationship came to an end in the late spring or summer of 2000 when, after Corral made known his plans to leave his employment with Parker County, plaintiff lerned that Corral had another girlfiend and that, apparently, he did not plan to continue his relationship with plaintiff. [2] It was at that time that plaintiff disclosed her relationships with Corral to officials at the Parker County jail. Earlier, she had disclosed her relationships with Corral to her mother and her attorney, but, apparently neither of them thought it necessary of apprpriate to make any disclosure of the relationship to any official in Parker County.

Corral did not, through implied threats, intimidations, or otherwise, force plaintiff to perform sex acts with him. Nor did the sex acts plaintiff had with Corral cause her embarrassment, abuse, or humiliation. Rather, plaintiff willingly engaged in the sex acts, thinking that she would

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[1] The exaggerated, and false, allegations made by plaintiff in her complaint, as well as false testimony she gave at the hearing, and her demeanor while testifying, have caused the court to question the credibility of plaintiff. To the extent plaintiff gave testimony inconsistent with any of the finding made by the court, the court did not consider that testimony to be credible.

[2] Inasmuch as plaintiff's complaint falsely alleges the circumstances concerning her sexual contacs with Corral, she chose not to assert any claim or cause of action based on her disappointment that he did not live up to her expectation that he would engage in a long-term relationship with her.

benefit from her relationship with Corral, at least as much as he would benefit from it.

According to plaintiff, in the late summer of 2000, several weeks [3] after she last had sexual contact with Corral, she was treated for inflammations or infections in her pelvic area through a health care provider used by Parker County for its inmates. Plaintiff's hearing testimony implied that the problems she experienced were the result of a veneral disease she contracted from Corral. [4] However, the court cannot find from the evidence that whatever health problems plaintiff experienced during or after August 2000 were caused by her relationships with Corral. [5]

During her hearing testimony, plaintiff expressed a concern that she had suffered a veneral disease that could cause her to be sterile, though she said that there has been no such determination in her case. The court notes that among the exhibits in a medical record dated February 4, 2000, reflecting that plaintiff reported to the health care provided at that time that she could not become pregnant. [6] The

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[3] The record of plaintiff's treatment in early September 2000 has an entry that plaintiff reported that her last sexual intercourse was four months earlier.

[4] Plaintiff complains in her post-hearing memorandum of a question the court asked during the hearing concerning her history of venereal disease. Plaintiff overlooks that she injected the issue into the record by offering an exhibit that disclosed a history of venereal disease. The court simply followed-up with a question asking for an explanation.

[5] The medical records received into evidence suggest that before her relationships with Corral she was having complaints similar to some of those she had after she became involved with Corral. Also, there is a request form completed by plaintiff in February 2000 making the request that she "would like to have [her] HIV/Aids & syphilis testing."

[6] The court is not providing record references to contents of exhibits because, contrary to the spirit of the requirement relative to exhibits

court cannot find from the evidence that plaintiff's relationships with Corral caused her to be sterile.

Plaintiff maintains that she suffered emotional problems because of her relationship with Corral. Again, the court cannot find from the evidence that whatever emotional problems plaintiff has experienced since her relationships with Corral were caused by those relationships. One of the exhibits offered by plaintiff appears to be copies of records of the Texas Department of Criminal Justice pertaining to psychological treatment plaintiff received in the years 2001 and 2002. They indicate that plaintiff was having emotional problems, but the records do not attribute the problems to plaintiff's relationships with Corral. [7] The summary of findings of her initial evaluation in May 2001 does not mention any event in her life that was causative of her emotional problems other than traumatic incest, about which she had nightmares and flashbacks. An entry in the clinicl notes of the Texs Department of Criminal Justice dated April 30, 2002, give the following history related to plaintiff; "History of drug abuse since age 21, primarily methamphetamine. Treated in Ft. Worth hospital one day to to an overdose and received Elavil in

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contained in the final paragraph of the court's June 7, 2002, order, the individual items in plaintiff's voluminous exhibits are not tabbed, nor are the exhibits paginated, with the consequence that the giving of record references is rendered unduly burdensome.

[7] There is mention in a clinic note included in these records, which appears to be dated in mid-July 2001, that plaintiff gave a history that she was "raped in Co," and that she "miscarried the child from the rape in Co." These comments might have reference to sexual relationships between plaintiff and Corral. However, the court is satisfied that, if they do, thy are inaccurate because they do not correspond with what the courts fins the true facts to be.

county jail due to depressed mood and nightmares associated with childhood abuse." A treatment plan that was devised for plaintiff in early 2002 gave as her history childhood sexual abuse, and as the goal of the treatment recovery from childhood sexual abuse. Similarly, the medical records for periods of time prior to plaintiff's relationships with Corral disclose that she ws having emotional problems before she met Corral. For example, in January 2000, she was diagnosed as having "Acute Situational Anxieties."

At the time of the hearing, plaintiff was out of custody. She was working as an assistant manager of the Seven Points Dairy Queen in Seven Points, Texas. In response to a question by her attorney, plaintiff testified at the hering that she is asking the court to award her at least one million dollars. When asked by the court to explain how she arrived at that amount, she answered that she had heard of women who had had similar things happen to them, and that some of them had received three and six million dollars for what they had to go through. Plaintiff failed to give any indication as to any amount she thinks would be appropriate for any element of damage. The court cannot find from the evidence that plaintiff has suffered any cognizable damage that can be traced to her relationship with Corral.

On February 21, 2001, Corral pleaded guilty to two charges of improper sexual activity with a person in custody. [8] In each instance, plaintiff ws the

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[8] Violation of the Texas Penal Code doe not give rise to a private cause of action. See Spellmon v. Sweeney, 819 S.W.2d 206, 211 (Tex. App; – Waco 1991, no writ).

person with whom he was alleged to have had sexual activity. The date of commission of one of the offenses was May 1, 2000, and the date of commission of the other was June 5, 2000. His punishment for each offense was two years of confinement, which was suspended, a fine of one thousand dollars, and community supervision for a period of five years.

III.

Conclusion

While a court normally will accept as true well-pleaded allegations of fact in ruling on a request for default judgment, if the court learns from evidence at the default judgment hearing that the true facts are different from the pleaded facts, the court will take the true facts into account in ruling on the request for default. In this case, the evidence developed on damage issues coincidentlly proved that the allegations of the complaint concerning the nature of the sexual contacs between plaintiff and Corral are false. Therefore, the court is relying on the true facts in evaluating the nature of the default judgment to be rendered. If, as plaintiff alleged in her complaint, she "through implied threts and intimidations" been forced "to perform sex acts with Defendant Corral," the prospect that plaintiff would have been injured by Corral's conduct would be high. An entirely different damage picture is presented when one recognizes that the true fact is that plaintiff's sexual relationship with Corral were consensual.

The court questions whether plaintiff should be granted a default judgment of nay kind under the facts found by the court. [9] However, the court has concluded to give plaintiff the benefit of the doubt and award her a default judgment as to liability against Corral based on his failure to answer or otherwise repond to her complaint. And, while the court is unable to find that plaintiff suffered damages by reason of her relationships with Corral, the court nevertheless is awarding plaintiff $1.00 as nominal damages. However, the court is not awarding plaintiff recovery of an attorney's fee. Counsel for plaintiff advised the court at the hearing that the claim for an attorney's fee is based on 42 U.S.C. § 1988, which gives the court discretion to allow the prevailing party in a 42 U.S.C. § 1983 action a reasonable attorney's fee as part of the costs. The court does not consider that Beavers is the "prevailing party" in this action, within the meaning of 42 U.S.C. § 1988(b). Moreover, the evidence at the hering establishes that thre is no viable § 1983 claim in this case.

Therefore, the court is rendering default judgment in favor of plaintiff against Corral for $1.00, and is ordering that she recover costs of court, exclusive of attorney's fees, from Corral.

SIGNED February 28, 2003.

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[9] Aparty is not entitled to a default judgment as a matter of right, even where the defendant technically is in default. See Lewis v. Lynn, 236 F.3d 766, 767 (5th Cir. 2001). As the Ninth Circuit noted in Eitel v. McCool, factors that may be considered by a court in exercising discretion as to the entry of a default judgment include the merits of plaintiff's substantive claim and the sufficiency of the complaint. 782 F.2d 1470, 1471-72 (9th Cir. 1986). In the instant action, the court learned at the hearing that plaintiff's substantive claims are without merit and that her complaint is insufficient in that it contains false allegations.

/s/ _____
JOHN McBRYDE
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

SHERRY BURNS BEAVERS, **Plaintiff,**	* **NO. 4:02-**
	* **CV-336-A**
VS.	*
JAY BROWN, INDIVIDUALLY AND AS SHERIFF OF PARKER COUNTY, TEXAS, ET AL., **Defendants**	*
	*

ORDER

Came on to be considered the motion of plaintiff, Sherry Burns Beavers, for new trial. Having reviewed the motion, the court concludes that it should be granted. Therefore,

The court ORDERS that plaintiff's motion for new trial be, and is hereby, granted.

The court further ORDERS that the court's January 16, 2003, order and final judgment be, and are herby, reinstated.

The court further ORDERS that a hearing on plaintiff's motion for default judgment be, and is hereby, set for 10:00 a.m. on February 13, 2003.

SIGNED January 28, 2003.

/s/
JOHN McBRYDE
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

SHERRY BURNS BEAVERS, Plaintiff	* NO. 4:02-
	* CV-336-A
VS.	*
JAY BROWN, INDIVIDUALLY AND AS SHERIFF OF PARKER COUNTY, TEXAS, ET AL.,	*
Defendants.	*

FINAL JUDGMENT

In accordance with the order of dismissal signed by the court this same day,

The court ORDERS, ADJUDGES, and DECREES that plaintiff Sherry Burns Beavers, recover nothing against defendant Robert A. Corral ("Corral"), and that all claims and causes of action asserted by plaintiff against Corral in the above-captioned action be, and are hereby, dismissed for want of prosecution.

SIGNED January 16, 2003.

JOHN McBRYDE
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

SHERRY BURNS BEAVERS, **Plaintiff**	* **NO. S:02-**
	* **CV-336-A**
VS.	*
JAY BROWN, INDIVIDUALLY AND AS SHERIFF OF PARKER COUNTY, TEXAS, ET AL., **Defendants.**	*

ORDER

By order signed January 7, 2003, the court set a hearing for 10:00 a.m. on January 16, 2003, on the motion of plaintiff, Sherry Burns Beavers, for default judgment. Because neither plaintiff nor her attorney appeared for the hearing, the court is dismissing plaintiff's claims against the remaining defendant, Robert A. Corral ("Corral"), for want of prosecution. The court concludes that no lesser sanction would adequately address plaintiff's failure to appear for the hearing. Therefore,

The court ORDERS that plaintiff recover nothing against Corral, and that all of plaintiff's claims and causes of action against Corral be, and are hereby, dismissed for want of prosecution.

SIGNED January 16, 2003.

/s/
JOHN McBRYDE
United States District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

SHERRY BURNS BEAVERS, **Plaintiff**	* **NO. S:02-**
	* **CV-336-A**
VS.	*
JAY BROWN, INDIVIDUALLY AND AS SHERIFF OF PARKER COUNTY, TEXAS, ET AL.,	*
Defendants.	*

FINAL JUDGMENT AS TO DEFENDANT

In accordance with the order of dismissal signed by the court this same day,

The court ORDERS, ADJUDGES and DECREES that plaintiff, Sherry Burns Beavers, recover nothing from defendants Jay Brown and Parker County, Texas, and that all claims and causes of action asserted by plaintiff against defendants Jay Brown and Parker County, Texas, in the above-captioned action be, and are hereby, dismissed with prejudice.

The court futher ORDERS, ADJUDGES and DECREES that defendants have and recover from plaintiff costs of court incurred by them.

SINGED January 16, 2003.

JOHN McBRYDE
United States District Judge

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

SHERRY BURNS BEAVERS, **Plaintiff**	* **NO. $:02-**
	* **CV-336-A**
VS.	*
JAY BROWN, INDIVIDUALLY AND AS SHERIFF OF PARKER COUNTY, TEXAS, ET AL., **Defendants.**	*
	*

MEMORANDUM OPINION and ORDER

Came on for consideration the motion of defendants Jay Brown ("Brown") (who has been sued in his individual capacity and in his official capacity as Sheriff of Parker County, Texas) and Parker County, Texas, to dismiss. Having reviewed the motion, the response of plaintiff, Sherry Burns Beavers, and applicable authorities, the court concludes that the motion should be granted.

I.
Plaintiff's Complaint

Plaintiff alleges in her complaint that: While in custody at the Parker County jail, defendant Anthony Corral ("Corral"), a deputy sheriff jailer, engaged in acts of sexual intercourse with her, in

violation of Texas law and the rules and regulations of the Parker County Sheriff's Department:

> Defendant Corral knowingly and
> Intentionally through implied threats
> And intimidations forced Plaintiff to
> Perform sex acts with Defendant
> Corral for Defendant Corral's own
> Self gratification causing embarrassment,
> Abuse and humiliation of the Plaintiff.

Comp. ¶ 13. On December 4, 200, Corral was charged by information and complaint with intentionally engaging in sexual intercourse with plaintiff. Corral pleaded guilty on February 21, 2001, to committing an improper sexual act with a person in custody, and hw was sentenced to two years' imprisonment and a five-year term of community supervision.

Plaintiff has sued (1) Corral in his individual capacity, as well as his capacity as a deputy sheriff jailer of Parker County, and (2) Brown, in his individual capacity, and as sheriff of Parker County. Plaintiff asserts a section 1983 claim, based on violations of plaintiff's Eighth Amendment rights, and state-law claims of negligence, gross negligence, assault, and battery.

II.
Analysis

The standards for deciding a motion under FED. R. CIV. P. 12(b)(6) are well-settled. The court's task is to determine "not whether a plaintiff will ultimately prevail but whether the claimant is

entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). A complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The court construes the allegations of the complaint favorably to the pleader. Scheuer, 416 U.S. at 236. However, the court does not accept conclusory allegations or unwarranted deductions of fact as true. Tuchman v. DSC Communications Corp., 14 F.3d 1061, 1067 (5th Cir. 1994).

A. Plaintiff's Claims Against Brown in His Individual Capacity

It is clear from plaintiff's complaint that Brown's actions or inactions, if any, taken in relation to this case were in his official capacity as Parker County sheriff. The court concludes that plaintiff has failed to state a claim against Brown in his individual capacity upon which relief may be granted, and that accordingly, plaintiff's claims against Brown in his individual capacity should be dismissed pursuant to FED. R. CIV. P. 12(b)(6).

B. Plaintiff's Claims Against Brown in His Official Capacity

Plaintiff's claims against Brown in his official capacity as sheriff are properly construed as a claim against Parker County, Texas. Brooks v. George County, Miss., 84 F.3d 157, 165 (5th Cir.), cert.

denied, 519 U.S. 948 (1996). Therefore, the court is substituting Parker County, Texas, for Brown in his official capacity as a defendant in this action, and the court is deeming all claims asserted in this action against Brown and Corral in their official capacities as claims against Parker County, Texas.

A county may be liabile under section 1983 only for its own unconstitutional or illegal policies, and not for the tortuous acts of its employees under a respondeat superior theory. Monell v. New York City Dep't of Soc. Serve., 436 U.S. 658, 690-91 (1978). Section 1983 liability extends to a municipality upon a showing of the adoption of an unconstitutional official policy or custom, defined as:

> (a) policy statement, ordinance, regulation or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority. . . . Alternatively, official policy is [a] persistent, Widespread practice of city officials or employees, which although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy.

Evans v. City of Houston, 246 F.3d 344, 358 (5th Cir. 2001)(defining "official policy" for purposes of § 1983 liability)(internal citations and quotations omitted).

The factual allegations against Parker County do not satisfy this rigid standard. Plaintiff compiles in his complaint thirteen alleged negligent and improper actions by Parker County that caused plaintiff's injuries. Compl. ¶ 10. The court concludes that plaintiff's assertions of a causal connection between Parker County's actions and plaintiff's injuries are tenuous at best, and amount to nothing more than improper conclusory allegations. See, e.g. Keenan v. Tejada, 290 F.3d 252, 263 (5th Cir. 2002)(requiring an "affirmative link" between the county's policy and plaintiff's injuries); Bd. Of County Comm'rs of Bryan County, Okla. v. Brown, 520 U.S. 397, 404 (1997)(stating that "a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights"). Moreover, plaintiff concedes that the official policies of Parker County and Texas were to disallow the complained-of conduct:

> At all time Defendant Corral knew that such Activities were contrary to the Rules and Regulations of the Sheriff's Department of Parker County, Texas and the laws of the State of Texas.

Compl. ¶ 8.

The court concludes that plaintiff has failed to state a section 1983 claim against Parker County upon which relief may be granted. Likewise, Parker County is entitled to sovereign immunity from

plaintiff's state-law claims. See Dallas County Mental Health & Mental Retardation v. Bossley, 968 S.W.2d 339, 341 (Tex.) cert. denied, 525 U.S. 1017 (1998). Plaintiff has not alleged that Parker County's immunity has been waived through liability under the Tort Claims Act, TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001-.109. Id. Accordingly, plaintiff's claims against Parker County should be dismissed pursuant to FED. R. CIV. P. 12(b)(6).

III.
O R.D.E.R.

For the reasons discussed,

The court ORDERS that Parker County, Texas, be, and is hereby, made a defendant in this action, and all claims asserted by plaintiff in this action against Brown in his official capacity or against Corral in his official capacity be, and are hereby, deemed to be claims asserted by plaintiff against Parker County, Texas.

The court further ORDERS that the motion of Brown and Parker County, Texas, to dismiss be, and is hereby, granted.

The court further ORDERS that plaintiff recover nothing against Brown or Parker County, Texas, and that all claims and causes of action asserted by plaintiff against Brown and Parker County, Texas, be, and are hereby, dismissed with prejudice.

The court determines that there is no just reason for delay in, and hereby directs, entry of final

judgment as to the dismissal of plaintiff's claims against Brown and Parker County, Texas.

SIGNED January 6, 2003.

/s/
JOHN McBRYDE
United States District Judge